Nos. 92-1350 and 92-1447

In the Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE L. PARKER, PETITIONER

v.

GILBERT S. MERRITT, DAMON J. KEITH, AND PIERCE LIVELY

NORMAN A. MOSCOWITZ, PETITIONER

v.

GILBERT S. MERRITT, DAMON J. KEITH, AND PIERCE LIVELY

ON PETITIONS FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a nonparty witness who has testified before a special master appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure to hear a reopened extradition proceeding has the right to challenge the order appointing the special master.

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OPINIONS BELOW

The order of the court of appeals appointing a special master (92-1350 Pet. App. A9-A16), the order of the court of appeals denying petitioner George Parker's motion to rescind its order appointing a

special master (92-1350 Pet. App. A73-A74), and the order denying petitioner Norman Moscowitz's suggestion for hearing en banc (92-1447 Pet. App. A2) are unreported.

JURISDICTION

The order of the court of appeals denying petitioner Parker's motion to rescind its order appointing a special master was entered on November 4, 1992. The order of the court of appeals denying petitioner Parker's suggestion for rehearing en banc and petitioner Moscowitz's suggestion for hearing en banc was entered on December 2, 1992. The petition for a writ of mandamus or prohibition in No. 92-1350 was filed on February 1, 1993, and the petition for a writ of mandamus or prohibition in No. 92-1447 was filed on March 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATEMENT

1. On June 23, 1981, after a bench trial, the United States District Court for the Northern District of Ohio issued an order revoking the certificate of naturalization of John Demjanjuk. See *United States* v. *Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982). Subsequently, the United States initiated deportation proceedings against Demjanjuk, and in 1984, he was ordered deported. *Matter of Demjanjuk*, A8 237 417 (Immigration Court May 23, 1984), aff'd, (BIA Feb. 14, 1985), aff'd, *United States* v. *Demjanjuk*, 767 F.2d 922 (6th Cir. 1985) (Table), cert. denied, 474 U.S. 1034 (1985).

In November 1983, the State of Israel requested Demjanjuk's extradition to stand trial for violations of Israeli's Nazis and Nazi Collaborators (Punishment) Law. *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 550-552 (N.D. Ohio 1985). The extradition court found sufficient evidence to believe that Demjanjuk had committed the crimes charged, and it certified that Demjanjuk was subject to extradition to Israel. Thereafter, the district court denied a petition for habeas corpus seeking to block Demjanjuk's extradition to Israel. *Demjanjuk* v. *Petrovsky*, 612 F. Supp. 571, 577 (N.D. Ohio 1985), aff'd, 776 F.2d 571, 576 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986).[1]

2. On June 5, 1992, the panel of the court of appeals that had affirmed the order denying Demjanjuk's petition for habeas corpus challenging his extradition to Israel issued an order stating that based on its "previous study of the record and numerous press reports," it had decided to give "[c]onsideration * * * to whether this court's refusal to grant the petition for writ of habeas corpus was erroneous." 92-1350 Pet. App. A1-A2. The order directed the government and Demjanjuk to file briefs setting forth the evidence bearing on the question whether Demjanjuk was the Treblinka guard known as Ivan the Terrible or whether another man, Ivan Marchenko, was that guard.[2] In addition, the court ordered the parties to

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[1] In April 1988, an Israeli court found Demjanjuk guilty of crimes against the Jewish people, crimes against humanity, war crimes, and crimes against persecuted peoples at the Treblinka and Sobibor death camps, in violation of Israel's Nazis and Nazi Collaborators (Punishment) Law.

[2] During the course of Demjanjuk's appeal to the Supreme Court of Israel, the Israeli prosecutor submitted to that court

file a second brief on "the question whether the Court should reconsider its earlier decision concerning the issuance of a writ of habeas corpus in this case." *Id.* at A4.

In response to those orders, the United States filed a brief setting forth the evidence in its possession bearing on Demjanjuk's activities during the war and the identity of the operator or operators of the gas chamber at Treblinka. In addition, however, the government asserted that Demjanjuk's extradition to Israel had deprived the court of appeals of authority or jurisdiction to reopen the habeas corpus proceedings rising out of Demjanjuk's extradition.

On August 17, 1992, the court of appeals issued an order rejecting the government's jurisdictional arguments and designating a special master to determine "whether this court mistakenly affirmed the district court's denial of John Demjanjuk's habeas corpus petition." 92-1350 Pet. App. A9-A10. The court held that it had the authority to reopen the proceeding to determine whether government attorneys had perpetrated a fraud on the court by withholding evidence. The court ordered the special master to take the testimony of four Department of Justice attorneys involved in proceedings against

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evidence obtained from Soviet Union files containing statements of Red Army soldiers who became concentration camp guards after being captured by the Germans. In some of the Soviet statements, former guards at the Treblinka death camp stated that a Ukrainian named Ivan Marchenko operated the gas chambers at Treblinka. The Israeli Supreme Court has agreed to consider all of the new evidence. As of yet, that court has not rendered a decision on Demjanjuk's appeal.

Demjanjuk: Allan A. Ryan, Jr., Norman A. Moscowitz, George L. Parker, and John J. Horrigan. The court of appeals' order then directed the special master to report to the court of appeals on the question whether Department of Justice attorneys "engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious Ukrainian guard known as 'Ivan the Terrible' who operated the gas chambers at the Treblinka." *Id.* at A10, A15.

4. Pursuant to the court of appeals' order, the special master, Judge Thomas A. Wiseman of the United States District Court for the Middle District of Tennessee, scheduled hearings to take the testimony of the attorneys named in the court of appeals' order.[3] Counsel for Demjanjuk subpoenaed petitioners George L. Parker and Norman A. Moscowitz to testify before the special master on November 11 and 12, 1992.[4]

On October 28, 1992, petitioner Parker filed a motion requesting the court of appeals to rescind its order of August 17, 1992, appointing a special master. Parker argued that in the absence of exceptional circumstances, the court of appeals lacked authority under Rule 53 of the Federal Rules of Civil Procedure

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[3] In addition to the four attorneys named in the court of appeals' order, the special master also has heard the testimony of Martin Mendelsohn and Bruce Einhorn, two other Department attorneys involved in the proceedings against Demjanjuk, and has authorized the parties to take depositions of other witnesses.

[4] Moscowitz's testimony later was rescheduled to January 14 and 15, 1993.

to appoint a special master and that no exceptional circumstances justifying the appointment of a special master existed in this case. At the same time, Parker filed a motion with the special master seeking to stay the subpoena. On October 30, 1992, the special master denied the motion for a stay, and on November 4, 1992, the court of appeals denied the motion to rescind its August 17, 1992, order. The court of appeals' order stated: "[t]he Court for the reasons previously stated regards this case as exceptional and therefore declines to rescind its earlier order." 92-1350 Pet. App. A73. On November 6, Parker filed a suggestion for rehearing en banc of the court of appeals' November 4 order, and on November 10, Parker again sought a stay of the hearing scheduled for November 12 before the special master. The court of appeals denied the motion to stay on the same day that it was filed; the court denied the suggestion for rehearing en banc on December 2, 1992.[5]

On November 5, 1992, petitioner Moscowitz filed a motion to quash the subpoena directing his appearance before the special master and a suggestion for hearing en banc of his motion to quash. Moscowitz argued, among other things, that Demjanjuk's extradition deprived the court of appeals of jurisdiction, that Demjanjuk had failed as a matter of law to make allegations showing fraud on the court, and that the court had improperly expanded the scope of the proceeding to include the denaturalization and depor-

[5] Subsequently, Parker applied to this Court for a stay of the court of appeals' order dated August 17, 1992. Justice Stevens denied the application on March 18, 1993. *In re George L. Parker*, App. No. A-705.

tation proceedings against Demjanjuk. On December 2, 1992, the court of appeals denied those motions in the same order in which it denied Parker's suggestion for rehearing en banc.

3. On November 12 and 13, 1992, Parker traveled from his home in Rochester, New York, and appeared before the special master in Nashville, Tennessee. During hearings held on those dates, petitioner testified regarding his participation in the proceedings against Demjanjuk. Similarly, on January 14 and 15, 1993, Moscowitz traveled to Nashville from Miami, Florida, and testified before the special master.

ARGUMENT

Petitioners request this Court to issue a writ of mandamus or prohibition directing the court of appeals to rescind its August 17, 1992, order appointing a special master. In support of their request, petitioners renew the claims that they asserted before the special master and the court of appeals.[6] Petitioners are not entitled to relief for several reasons.

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[6] Parker argues that the court of appeals lacked authority under Rule 53, Fed. R. Civ. P., to appoint a special master and that the court of appeals should have remanded the matter to the district court. 92-1350 Pet. 24-49. Moscowitz joins in those claims and also asserts that Demjanjuk's extradition to Israel deprived the court of appeals of jurisdiction, that the court of appeals' procedure for investigating the allegation of fraud on the court violates the due process rights of the attorneys named in the court's order, and that Demjanjuk's allegations do not establish a prima facie case of fraud on the court. 92-1447 Pet. 10-29.

First, petitioners lack standing to raise their claims. The proceeding that petitioners seek to terminate originated as a petition for a writ of habeas corpus brought by John Demjanjuk against his custodians, who were officers of the United States.[7] Petitioners were not parties to the habeas proceeding, and, as petitioners concede (92-1350 Pet. 17; 92-1447 Pet. 3), they did not become parties when the court of appeals purported to reopen the habeas proceeding by appointing a special master in 1992. Neither petitioner has taken any steps to intervene in the original habeas proceeding. See Fed. R. Civ. P. 24; *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 548 n.9 (1986).

Moreover, the relief that Demjanjuk has sought in the court of appeals and before the special master relates primarily to his extradition to Israel.[8] Demjanjuk has not sought any relief against either petitioner, and in fact has reaffirmed in his briefs in opposition to the instant petitions (92-1350 Demjanjuk Br. in Opp. 5; 92-1447 Demjanjuk Br. in Opp. 6) that "[t]he crux of the dispute in this case is whether judicial approval under 18 U.S.C. § 3184 for Mr.

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[7] Demjanjuk brought his habeas petition against the custodian of the federal prison where he was being held at the time, the Attorney General of the United States, the Secretary of State, and the United States District Court for the Northern District of Ohio.

[8] Demjanjuk's second brief to the court of appeals asked the court to vacate the judgments in the denaturalization, deportation, and extradition cases against Demjanjuk and to issue an order directing the United States to use its best efforts to seek the return of Demjanjuk to the United States. Demjanjuk 2d C.A. Br. 60-61.

Demjanjuk's extradition to Israel was improperly procured by the Justice Department." Accordingly, because petitioners are not parties to the proceedings and because no relief is sought against them, they have no standing to file a motion seeking reconsideration of the order appointing the special master. See *Karcher* v. *May*, 484 U.S. 72, 77 (1987).

Second, neither petitioner has taken appropriate action to perfect his claim. Nonparty witnesses, such as petitioners, who wish to challenge the validity of a subpoena directing either testimony or the production of documents must move to quash the subpoena. If the court issuing the subpoena denies the motion to quash, the subpoenaed person may either comply with the subpoena or refuse to comply with the subpoena and suffer contempt. The person resisting the subpoena may obtain review of the subpoena on appeal from the contempt citation. See *United States* v. *Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 326-327 (1940). Failure to resist the subpoena and suffer contempt precludes the subpoenaed individual from obtaining review of the validity of the subpoena. *Alexander* v. *United States*, 201 U.S. 117, 121 (1906); see 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.13[2], at 123 (1993).[9]

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[9] This case does not implicate the narrow exception to that rule for "disinterested third parties." *Church of Scientology* v. *United States*, 113 S. Ct. 447, 452 n.11 (1992); see *Perlman* v. *United States*, 247 U.S. 7 (1918). Petitioners clearly view themselves as having a "sufficient stake in the proceeding to risk contempt by refusing compliance," 113 S. Ct. at 452 n. 11; and they are required to pursue the ordinary steps required to appeal. See *FTC* v. *Alaska Land Leasing, Inc.*, 778 F.2d 577

In this case, both petitioners were subpoenaed to appear before the special master. The appropriate method to challenge the subpoena—and the order appointing the special master—was a motion to quash. Parker's failure to take this step precludes him from obtaining review by this Court.[10] *Alexander* v. *United States*, 201 U.S. at 121-122 (witness may not obtain appellate or Supreme Court review of an order requiring production of documents before a special examiner unless he disobeys the order and suffers contempt). Although Moscowitz filed a motion to quash the subpoena, he did not refuse to appear when the motion to quash was denied. Instead, he complied with the subpoena and appeared to testify before the special master. For that reason, he also is barred from raising his current claims in this Court.

Petitioners claim that they may suffer injury if the special master finds that they engaged in a fraud on the court and thus that they should be granted standing to challenge the order appointing the special master. That contention is beside the point. Petitioners had an avenue to raise their claims and protect their interest; they have simply failed to make

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(10th Cir. 1985); 15B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3914.23, at 148 n.54 (2d ~~Cir~~. 1992) (collecting cases). *ED.*

[10] Petitioners' position is further weakened by two other factors. First, the subpoenas were ineffective to compel their attendance before the special master. Parker works and resides in Rochester, New York, and Moscowitz works and resides in Miami, Florida. Thus, neither may be compelled to appear before a special master in Nashville, Tennessee. See Fed. R. Civ. P. 45. Second, petitioners have already complied with the subpoenas.

use of it. Having failed to invoke the appropriate route to perfect a right to appeal, petitioners may not circumvent that failure by requesting the issuance of an extraordinary writ. *Will* v. *United States*, 389 U.S. 90, 97 (1967) ("Mandamus, of course, may never be employed as a substitute for appeal * * * ."); *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947) ("Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * We are unwilling to utilize them as substitutes for appeals."); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943) ("Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record.").

The cases on which petitioners rely (92-1350 Pet. 18-20; 92-1447 Pet. 3-5) to support their claim to standing to challenge the court of appeals' order appointing the special master are inapposite. In each of those cases, a court allowed an appeal by a person who had effectively become a party in the underlying action. None of those cases involved a subpoenaed witness, such as petitioners, who had an adequate means of obtaining review of the validity of their subpoenas. Moreover, to reiterate, petitioners are not parties to this proceeding, and they have not been treated as parties.[11]

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[11] The United States has not abandoned its claim that the court of appeals lacked jurisdiction to reopen the extradition proceedings or to appoint a special master. Instead, the government has deferred seeking review of the court of appeals' interim order reopening the extradition proceeding and appointing a special master until the court of appeals panel reaches a final decision. Moreover, the government believes

CONCLUSION

The petitions for a writ of mandamus or prohibition should be denied.

Respectfully submitted.

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APRIL 1993

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that Demjanjuk has produced no evidence either in the court of appeals or before the special master showing a fraud on the court. Thus, the government's cooperation with the special master and its opposition to these petitions do not constitute a waiver of its jurisdictional arguments.